Testimony of John P. Casey, Esq.

Before the Environment Committee

March 7, 2011

Re: **Raised Bill No. 1114,** ***An Act Revising the Definition of Tidal Wetlands and the High Tide Line.***

Senator Meyer, Representative Roy, and members of the Environment Committee, my name is John Casey and I want thank you for the opportunity to submit testimony regarding **Raised Bill No. 1114,** ***An Act Revising the Definition of Tidal Wetlands and the High Tide Line.*** I am here testifying in favor of the bill, in particular the provision amending the definition of "High Tide Line" in Section 22a-359(c) of the General Statutes ("HTL").

I am an attorney with Robinson & Cole LLP and practice land use law. Over the last seven years, I have developed a specialty in coastal management and permitting, and estimate that 75% of my practice is in this area. As such, I spend a great deal of time advising clients about their rights as owners of waterfront property and the procedures they must follow in order to obtain permits from the Department of Environmental Protection. I also interact with the staff of DEP's Office of Long Island Sound Programs on a regular basis.

A common issue that arises in these matters is the determination of the DEP's jurisdiction. While it is obvious that a dock in the water will be in the jurisdiction of the DEP, often property owners wish to avoid the DEP when undertaking activities on their upland property. To do so, the activities must take place above the HTL. The current HTL definition in Section 22a-359(c), which allows the DEP to determine its jurisdiction by a combination of one or more possible methods, leaves the ordinary person in doubt as to where and how that very important jurisdictional boundary is located. An attachment to my written testimony summarizes the history of the use and interpretation of the HTL as the DEP's jurisdictional boundary.

The ability of the DEP to use one or more methods to determine its jurisdiction is not acceptable. Any citizen dealing with the DEP is entitled to know with sufficient clarity what activities require a DEP permit and which do not. Through my experience, I have learned that there is ample data available from the National Oceanic and Atmospheric Administration regarding tidal elevations and that it would be easy to establish a jurisdictional elevation along the shoreline that will provide consistent and predictable results. **Raised Bill No. 1114** does just that by removing a convoluted and ambiguous definition of the HTL and replacing it with a simple reference to an established tidal elevation – Mean Higher High Water.

I urge the members of this Committee to support **Raised Bill No. 1114** so that the DEP's jurisdiction along the shore can be readily established and the citizens of the State will no longer have to guess whether an activity will be regulated by the DEP or not.

Addendum to Testimony of John P. Casey, Esq.

Before the Environment Committee

March 7, 2011

Re: **Raised Bill No. 1114, *An Act Revising the Definition of Tidal Wetlands and the High Tide Line.***

In order to understand the need for a change in the definition of "High Tide Line" ("HTL") as contained in Section 22a-359(c) of the General Statutes, it is necessary to understand the history of the use of the HTL as the Department of Environmental Protection's jurisdictional limit over activities along the coast and the DEP's interpretation and application of the HTL definition.

Section 22a-359(c) currently defines the HTL as follows:

> As used in this section and sections 22a-360 to 22a-363, inclusive, "high tide line" means a line or mark left upon tide flats, beaches, or along shore objects that indicates the intersection of the land with the water's surface at the maximum height reached by a rising tide. The mark may be determined by (1) a line of oil or scum along shore objects, (2) a more or less continuous deposit of fine shell or debris on the foreshore or berm, (3) physical markings or characteristics, vegetation lines, tidal gauge, or (4) by any other suitable means delineating the general height reached by a rising tide. The term includes spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

Activities that take place waterward of the HTL require a permit from the DEP pursuant to Section 22a-361, which states, in relevant part:

> The Commissioner of Environmental Protection shall regulate dredging and the erection of structures and the placement of fill, and work incidental thereto, in the tidal, coastal or navigable waters of the State *waterward of the high tide line.*

The HTL definition in Section 22a-359(c) was enacted as part of Public Act 87-495 (the "Act"). The Act was passed in part to specify that the DEP's jurisdictional limit over activities in "the tidal, coastal or navigable waters of the state" extends from the "high tide line," and the definition of HTL included in the Act was intended to emulate the Army Corps definition set forth in the Code of Federal Regulations. *Conn. Standing Committee Hearings, Environment*, Pt. 3, 1987 Sess., pp. 776-847 (Feb. 25, 1987, Hearing on HB 7211, passed as P.A. 87-495).

Prior to the passage of the Act, the DEP's jurisdiction began at mean high water. During the only hearing on the Act, Arthur Rocque, DEP Director of Finance (and later DEP Commissioner) testified that the change would allow the DEP's jurisdiction to coincide with the Army Corps' jurisdiction. Also during the hearing, David Leff, of the Office of Legislative Research, stated, "Yes, they [the mean high water mark and high tide line] are very different. But the definition

that DEP is using for the high tide line in this bill is the *exact same* definition that the Corps uses for high tide lines." The definition adopted in the Act, however, was not the "exact same" as the Army Corps definition then in effect, that remains in effect to this day, and which provides:

> The term high tide line means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, *in the absence of actual data,* by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

33 C.F.R. § 328.3(d) (emphasis added). Rather, the definition proposed by the DEP and adopted by the Legislature tracked the definition previously contained in 33 C.F.R. § 323.2(g) (Vol. 51, 1986).[1] That definition, however, was removed from the Federal Regulations, and the current definition was added, in 1986. 51 Fed. Reg. 41250, Nov. 13, 1986. The current definition was effective from January 12, 1987, which was before the hearing on, and passage of, the Act. Despite this fact, there is no record of why the DEP did not propose the current Army Corps definition.

The key difference between the HTL definition in Section 22a-359(c) and the Army Corps definition is the missing phrase "in the absence of actual data." If the DEP was required to use "actual data," as the Army Corps must under its regulations, there would be more certainty in DEP's jurisdictional determinations and the alternative options in the statute for determining the HTL could not be used unless actual data did not exist

After the passage of the Act, the DEP's manner of interpreting the HTL has changed throughout the years.[2] For the period immediately following the passage of the Act until 1990, the DEP

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[1] "The term 'high tide line' is the line used in Sec. 404 determinations and means a line or mark left upon tide flats, beaches, or along shore objects that indicates the intersection of the land with the water's surface at the maximum height reached by a rising tide. The mark may be determined by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The term includes spring high tides and other high tides that occur with periodic frequency, but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm."

[2] Section 22a-361(c), which was also part of the Act, provides the DEP with the authority to adopt "regulations to carry out the provisions of sections 22a-359 to 22a-363, inclusive." The DEP, however, has never adopted any such regulations. Instead, in order to determine its jurisdiction, the DEP has relied over the years on a series of guidelines to determine the HTL.

determined the HTL by using the "highest predicted tide" as calculated yearly by the National Oceanic and Atmospheric Administration ("NOAA"). *Office of Legislative Research*, Report No. 94-R-0117 (Feb. 4, 1994). Starting in 1990, "the DEP decided to use the 'one-year flood frequency' calculation of the Army Corps of Engineers." *Id.* (explaining that "The one-year flood frequency is a storm event with a 100% chance of occurring every year.") The benefit of the one-year tidal frequency flood is that:

> Unlike the highest predicted tide, this number is not adjusted yearly, but is changed periodically as new data is collected. The most recent revision was in 1988. [Rick] Huntley [of DEP-OLISP] says that the department changed to using the one-year flood frequency level because it better reflects the statutory definition and is more stable over-time. The one year flood frequency reaches a higher point on the shore than the highest predicted tide.

*Id.*

In 2007, after 17 years, the DEP's use of the one-year frequency tidal flood to determine the HTL was called into question when it issued a final decision on the reissuance of a number of general permits by the Office of Long Island Sound Programs ("OLISP") that removed the reference to the one-year frequency tidal flood from the HTL definition. *In the Matter of 2007 OLISP General Permits*, LIS-GP-001 through LIS-GP-014, Dec. 19, 2007, ¶ 5 (noting that OLISP has now determined that the one-year frequency tidal flood elevation "is not an appropriate tool to identify the high tide line."), *aff'd*, DEP Comm'r, Dec. 20, 2007. Despite this pronouncement, the instructions for completing OLISP applications, which were only just revised and reissued on September 15, 2010, states that the one-year frequency tidal flood is the "generally acceptable approximation" of the HTL. *Instructions for Completing a Permit Application for Programs Administered by the Office of Long Island Sound Programs*, 09/15/10 Rev., Part IV, p. 14, ¶ 14.

The problems with Section 22a-359(c) are highlighted when there are disputes between property owners and the DEP over the location of the HTL. Three recent enforcement actions demonstrate the problem with the definition and the ability of the DEP to use multiple methods to determine the HTL – each of which may produce a different result. In the first case, the DEP relied on the one-year frequency tidal flood elevation and other methods when determining the HTL. *In the Matter of David & Betsy Sam*s, Order No. LIS-2004-091-V, Nov. 2, 2007 (currently on appeal to the Supreme Court as *Sams v State of Connecticut*, Docket No. S.C. 18438). In the *Sams* case, the hearing officer stated, "In circumstances such as this enforcement order, where the location of the HTL is a crucial factor, staff relies on a *combination of methods* to confirm the *maximum* reach of the tide. Use of one or a combination of methods is entirely consistent with § 22a-359(c)."

In the second case, the DEP relied primarily on visual observations of the tide at the respondent's property. *In the Matter of Carl Shanahan*, Order No. LIS-2006-060-V, Mar. 30, 2008 (currently

on appeal to the Supreme Court as *Shanahan v Commissioner of Environmental Protection*, Docket No. S.C. 18575). The hearing officer in that case held "Section § 22a-359(c) sets out a variety of methods that may be used to determine the HTL. These methods primarily involve visual observations of physical characteristics relating to a tidal event that has actually occurred." She went on to applaud the "flexibility [that § 22a-359(c)] affords to DEP staff to assess the HTL and assert its jurisdiction."

Lastly, in the third case, despite rejecting the use of NOAA tidal gauge data in *Shanahan*, the DEP relied on that information, as well as aerial photographs and visual observations, to determine the HTL. *In the Matter of John E. and Rhoda L. Loeb*, File No. LIS-2005-017-V, Mar. 19, 2009.

It is the DEP's "flexibility" to use a "variety of methods" to determine the HTL that is the problem with the current definition. This was noted by the trial court judge in the *Sams* appeal, when he stated:

> This case embodies the conflicting and unpredictable forces of nature versus the right to the uniform and consistent application of the law. The HTL, and thereby the jurisdictional power of the DEP, should not be established by a high tide on a randomly chosen day during which, in the opinion of a DEP official, the weather is not too stormy. Arguably, this was the approach used in this case, with the additional procedural step of reviewing the plaintiffs' previously filed maps showing an HTL of 4.1 feet, based upon USACE criteria not adopted by the rulemaking process.
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> To the degree that HTL is not consistently established, the commissioner's exercise of authority over activities where the HTL is disputed in tidal waters may be viewed as arbitrary or without a lawful foundation.

*Sams v State of Connecticut*, Docket No. HHB-CV-08-4016517-S, p. 23, Jud. Dist. of New Britain (March 26, 2009) (Taylor, J.) (emphasis added).

Also, the statute itself contains a material internal inconsistency. The statute states that the line ". . . indicates the intersection of the land with the water's surface at the *maximum height reached by a rising tide*," but then goes on to provide that the line may be determined "by any other suitable means delineating the *general height reached by a rising tide*." One is left, therefore, to question whether the HTL is the *maximum height* or the *general height* reached by a rising tide. Clearly, there is a difference between the two, but what that difference is and how it is determined are unknown.

For the reasons explained above, the current definition of HTL in Section 22a-359(c) allows for too much discretion by the DEP in making jurisdictional determinations. As such, the definition should be change as proposed in **Raised Bill No. 1114** ***An Act Revising the Definition of Tidal Wetlands and the High Tide Line.***